No. 89-1883

In The

Supreme Court of the United States

October Term, 1989

TRUCKEE-CARSON IRRIGATION DISTRICT, ET AL.,

Petitioners,

v.

UNITED STATES OF AMERICA, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court
Of Appeals For The Ninth Circuit

BRIEF OF RESPONDENT PYRAMID LAKE PAIUTE TRIBE OF INDIANS IN OPPOSITION

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INTRODUCTION

Respondent Pyramid Lake Paiute Tribe of Indians (Tribe) adopts and incorporates the Brief of the United States opposing the petition for a writ of certiorari. The Tribe concurs in the government's Statement of the Case. In this Brief, the Tribe presents supplemental arguments as additional reasons for denying the petition.

ARGUMENT

THERE ARE NO LEGAL ISSUES THAT WARRANT REVIEW.

Petitioners cite three reasons in support of granting their petition: (i) a conflict with *California v. United States*, 437 U.S. 645 (1978); (ii) the importance of determining the relationship between sections 8 and 10 of the 1902 Reclamation Act, 43 U.S.C. §§ 383 and 373; and (iii) the importance of establishing the proper relationship between the rule-making authority of the Secretary of the Interior (Secretary or Interior) and the continuing jurisdiction of courts to interpret, apply and enforce their water right decrees. Pet. 6-7. Significantly, there is no contention that the decision below conflicts with any decision of either a United States court of appeals or a state court of last resort.[1]

The petitioners, as well as their supporting amici, ignore the controlling considerations, the key part of section 8, the regulatory authority expressly granted the Secretary by a federal court decree, the procedural posture of this

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[1] To the contrary, the court of appeals followed its previous decision in Truckee-Carson Irrigation Dist. v. Secretary of the Interior, 742 F.2d 257 (9th Cir. 1984), *cert. denied*, 472 U.S. 1007, which involved the same parties and the same general controversy. Pet. App. A-126. The petitioners do not mention that binding precedent. There is no more reason for this court to review the instant case today than there was for it to review Truckee Carson Irrigation District v. Secretary of the Interior five years ago.

case[2] and the unique aspects of this case which render it unsuitable for resolving any issue of general significance.

1. The petitioners posit the existence of a conflict between sections 8 and 10 of the 1902 Reclamation Act. Pet. 11. Section 8 compels deference to state water laws in the administration of federal reclamation projects while section 10 authorizes the Secretary of the Interior "to perform any and all acts and to make such rules and regulations as may be necessary and proper for the purpose of carrying the provisions of this Act into full force and effect."[3] The alleged conflict depends on the implicit assumption that the deference to state water law required by section 8 means that the water related aspects of federal reclamation projects must be administered entirely by state officials and that the Secretary therefore cannot issue regulations which affect water or water rights in any way.

Where possible, two provisions of the same statute must be read so as not to create a conflict. *Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 370 (1986); *Helvering v. Credit Alliance Corp.*, 316 U.S. 107, 112 (1942). For purpose of this case, the key provision of section 8 is its

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[2] As the United States stresses in its Brief, review should not be granted because there has not yet been a final determination of the validity of the Secretary's initial bench/bottom classification and that determination, once it becomes final, will be subject to parcel by parcel review by the Federal Water Master. In its present posture, this case therefore is doubly interlocutory.

[3] Congress also delegated rule-making authority to the Secretary in several amendments and supplements to the 1902 Reclamation Act. 43 U.S.C. §§ 390ww(c), 440, 485i, 499 and 500.

directive that "the Secretary of the Interior, in carrying out the provisions of this Act, *shall proceed in conformity with such laws* [relating to the control, appropriation, use or distribution of water used in irrigation, or any vested right acquired thereunder . . .]." Emphasis added. This mandate, which the court below stressed (Pet. App. A-125), eliminates any possible conflict between sections 8 and 10 and negates any suggestion that the Secretary's regulations must steer clear of any and all issues involving state water law. Under the plain meaning of the two sections, the Secretary clearly is authorized to issue rules and regulations relating to the use or distribution of water or water rights as long as he proceeds "in conformity with [state] law." *See California v. FERC*, ___ U.S. ___ (No. 89-333, decided May 21, 1990), slip opinion at 12, 109 L.Ed.2d 474, 490. This is precisely what the Ninth Circuit held. Pet. App. A-126 ("We hold that under section 10 of the Act, the [Department of the Interior] is authorized to promulgate regulations establishing initial bench/bottom classifications, provided that the state law beneficial use standards mandated by section 8 are followed.") There is no conflict between the two sections, no ambiguity and no important question of federal law requiring resolution by this Court.

2. An entirely different situation was presented in *California v. United States, supra*. There, in an administrative proceeding, the State of California imposed several conditions on the water right granted to the United States for its project. The United States refused to accept those conditions and filed suit to have them declared invalid. This Court held that the California's conditions were

binding unless they conflicted with congressional directives.

In the instant case, by contrast, there is no claim that the government is violating any state substantive law or any condition imposed on the government's water rights by Nevada. Nor is there any suggestion that state officials have assumed any role with regard to classifying bench and bottom lands. This is not a case in which the Secretary's regulations displace, or purport to displace, any acts or decisions of state officials. Moreover, on remand, the petitioners are free to argue that the Secretary's bench/bottom classification violate state law standards. Pet. App. A-126. The decision below is entirely consistent with *California v. United States*.

3. The petitioners' argument really amounts to an insistence, as a matter of policy, that all irrigation projects in a state should be managed and administered entirely by state officials in order to insure uniform and consistent implementation of state laws. *See* Pet. 13-15. A similar argument was made in *Escondido Mutual Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765 (1984). In that case, the Federal Energy Regulatory Commission argued that licensed hydroelectric projects should not be made subject to the dual and potentially conflicting authority of both the Commission and other federal officials with different missions. This Court held that it was clear on the face of the statute and its legislative history that that was exactly what Congress intended. 466 U.S. at 773-777. Here it is equally obvious, as well as very sensible, that Congress provided meaningful roles for the Secretary and state officials both of whom are charged with carrying out the same state substantive laws. *See Ivanhoe Irrigation*

Dist. v. McCracken, 357 U.S. 275, 296 (1958) ("It is hardly lack of due process for the government to regulate [federal reclamation projects] which it subsidizes," quoting *Wickard v. Filburn*, 317 U.S. 111, 131 (1942)).

4. Even if the general authority of the Secretary of the Interior under the Reclamation Act to issue regulations affecting the use of water within federal reclamation projects could be questioned, there can be no reasonable doubt about his regulatory authority over the Newlands Project's water rights. The Secretary's authority over the Newlands Project is based not only on the federal reclamation laws but also on contracts and a federal court decree. To understand the unique laws applicable to the Newlands project, some historical background is necessary.

In February 1926, the Federal District Court in *United States v. Orr Water Ditch Co.*, Equity No. A-3, (D. Nev. 1944) (*Orr Ditch*), issued a "Temporary Restraining Order" which governed the diversion and use of the water for the Truckee River from that time until the Final Decree was entered 18 years later. *See Nevada v. United States*, 463 U.S. 110, 117-118 (1983). The 1926 Temporary Restraining Order defined the right of the United States to divert and use the waters of the Truckee River for the Newlands Reclamation Project and expressly made that right subject to the "control, disposal and regulation" of the United States.[4]

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[4] The 1926 Temporary Restraining Order states in pertinent part (with emphasis added):

(Continued on following page)

The Newlands Project was operated by the Interior Department until 1927. In December 1926, Interior and the Truckee-Carson Irrigation District (TCID) entered into a contract under which TCID assumed responsibility for the operation and maintenance of the Project. Ex. 36. In pertinent part, Articles 7 and 34 of that contract provided as follows:

> 7. The District [TCID] hereby accepts the care, operation and maintenance of the transferred works and will care for, operate and maintain

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> Subject to prior appropriations and vested rights permitted and confirmed by the Act of Congress of July 26, 1866, the plaintiff [United States] is entitled and allowed to divert, with a priority of July 2, 1902, through the Truckee Canal 1,500 cubic feet of water per second flowing in the Truckee River for the irrigation of 232,800 acres of lands on the Newlands Project for storage in the Lahontan Reservoir, for generating power, for, for supplying the inhabitants of cities and towns on the project and for domestic and other purposes, *and under such control, disposal and regulation as the plaintiff [United States] may make or desire,* provided that the amount of this water allowed or used for irrigation shall not exceed, after transportation loss and when applied to the land, *3.5 acre feet per acre for the bottom lands, nor 4.5 acre feet per acre for the bench lands* under the Newlands Project.

Precisely the same water duties for the Project's bench and bottom lands were repeated in the 1944 Orr Ditch Final Decree (reproduced in the Appendix to this Brief) and in the 1980 Final Decree in the Carson River water rights adjudication, United States v. Alpine Land Reservoir Co., 503 F.Supp. 877 (D. Nev.), *affirmed in relevant part,* 697 F.2d 851 (9th Cir. 1983), *cert. denied,* 464 U.S. 863.

> the same and deliver water therefrom in full compliance with . . . court orders and decrees, . . . the terms and conditions of this agreement, the rules and regulations of the Secretary [of the Interior] now in force or hereafter promulgated; and, . . . will use all proper methods and precautions to secure the economical and beneficial use of irrigation water. . . .
>
> 34. The Secretary reserves the right, so far as the purport thereof may be consistent with the provisions of this contract, to make reasonable rules and regulations, and to add to and modify them as may be deemed proper and necessary to carry out the true intent and meaning of the law and of this contract, and the District [TCID] hereby agrees that in the operation of the transferred works, all such rules and regulations will be fully adhered to.

Under these provisions, TCID was obligated to comply with the *Orr Ditch* Temporary Restraining Order and to use *"all proper methods and precautions* to secure the economical and beneficial use of irrigation water." Emphasis added. Interior reserved the right to enforce those obligations through the issuance of regulations and TCID agreed to "fully adhere" to Interior's regulations. These provisions of the 1926 contract compliment and are fully consistent with the provision of the *Orr Ditch* Temporary Restraining Order which subjected the Newlands Project's water rights to Interior's regulation and control.

In June 1935, Interior, TCID and others entered into the Truckee River Agreement to settle the *Orr Ditch* litigation. *See Nevada v. United States, supra,* 463 U.S. at 117-118. The parties to the Truckee River Agreement stipulated to the entry of a consent decree which embodied the provisions of the *Orr Ditch* Temporary Restraining Order with

certain modifications not pertinent to this action. Article X. Article XVI of the Truckee River Agreement deals with the 1926 contract between Interior and TCID. It states (in pertinent part):

> AGREEMENT BETWEEN UNITED STATES AND IRRIGATION DISTRICT DATED DECEMBER 18, 1926, TO REMAIN IN EFFECT.
>
> As between the United States and the Irrigation District [TCID] none of the provisions of the contract entered into between the United States and the Irrigation District dated December 18, 1926, shall be deemed to have been in any wise altered, changed, modified, or abrogated by the execution of this agreement. . . .

In September 1944, the Nevada Federal District Court entered the Final Decree in the *Orr Ditch* case by consent of the parties pursuant to the terms of the Truckee River Agreement. *Nevada v. United States, supra,* 463 U.S. at 118.

The *Orr Ditch* Final Decree expressly makes the Project's right to divert and use Truckee River water for agricultural purposes subject to "the control, disposal *and regulation*" of the United States, "provided that the amount of this water allowed or used for irrigation shall not exceed, after transportation loss and when applied to the land, 3.5 acre feet per acre for the bottom lands, nor 4.5 acre feet per acre for the bench lands under the Newlands Project." Emphasis added.[5] The plain meaning of this provision is that the only constraint on Interior's

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[5] The portion of the Orr Ditch Decree which defines the Truckee River water rights of the Newlands Project is reproduced in the Appendix to this Brief.

regulatory authority is that no more than 3.5 or 4.5 acre feet per acre can be delivered to the Project's farm headgates. The *Orr Ditch* Decree also states:

> Except as herein provided, no diversion of water into any ditch or canal, in this decree mentioned, shall be permitted except in such amounts as shall be actually reasonably necessary for the economical and beneficial use for which the right of diversion is determined and established by this decree.

Thus, on its face the *Orr Ditch* Decree plainly vests Interior with the regulatory authority to insure that the Truckee River water diverted to the Newlands Project is limited to "such amounts as shall be reasonably necessary for . . . economical and beneficial use . . . "[6] This authority is explicitly recognized and confirmed in the 1926 contract. As previously described, in that contract TCID agreed to deliver water "in full compliance with . . . court orders and decrees" and to "use all proper methods and precautions to secure the economical and beneficial use of irrigation water." Interior reserved the right "to make reasonable rules and regulations . . . to carry out the true intent and meaning of the law and of this contract."[7]

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[6] Of course, these provisions of the Orr Ditch Decree are final and cannot be relitigated. Nevada v. United States, *supra*.

[7] As described above, in the Truckee River Agreement, which was adopted, approved by and incorporated in the 1944 Orr Ditch Final Decree, TCID, acting on behalf of its members, stipulated to the entry of that Decree and agreed that nothing in the Decree or in the Truckee River Agreement would modify, change or abrogate any provision of the 1926 contract. Thus, if

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Interior's designation of the bench and bottom lands within the Newlands Project clearly is an exercise of regulatory authority, as well as a "method and precaution", aimed at securing the economical and beneficial use of irrigation water within the meaning of both the *Orr Ditch* Decree and the 1926 contract. The purpose of the Secretary's designation is to prevent excessive amounts of water from being delivered to thousands of acres of land within the Project.

The foregoing discussion establishes that the Secretary's regulatory powers over the Newlands Project are derived from several sources, the 1926 contract between the federal government and TCID, the Truckee River Agreement and the 1944 *Orr Ditch* Decree, as well as the federal reclamation laws. Therefore, this case does not present an appropriate opportunity for construing the general extent of the Secretary's authority under sections 8 and 10 of the 1902 Reclamation Act because there are several other complicating factors. There is no overriding, special or important reason for reviewing the Ninth Circuit's decision in the limited and narrow circumstances presented here.

5. Finally, the petitioners contend that review should be granted because the Ninth Circuit's decision allows Interior to interfere with the continuing jurisdiction of courts to interpret, apply and enforce their water

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there were any doubts about Interior's role under the Orr Ditch Decree, it would have to be construed in a manner which gives effect to the full extent of Interior's authority under the 1926 contract.

right decrees. Pet. 7, 17-18. This argument is specious. First and foremost, as we have seen the governing *Orr Ditch* Decree actually vests the Secretary with power to regulate the Newlands Project's water rights to insure reasonable and economical beneficial use. The Secretary is doing what the Decree authorizes him to do. Second, nowhere in its opinion did the District Court purport to exercise continuing jurisdiction or to modify any final decree. Third, the "Petition for Declaratory Relief" which initiated this proceeding sought a determination that the Secretary's bench/bottom classification is "arbitrary and unreasonable and not unenforceable." Pet. App. A-124. No one asked the court to amend or modify the final decrees.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

Excerpt from Final Decree in *United States v. Orr Water Ditch Co.*, Equity No. A-3 (D.Nev. 1944).

DERBY DAM AND TRUCKEE CANAL

Claim No. 3. Under the Reclamation Act of June 17, 1902, the United States, acting by the Secretary of the Interior, on July 2, 1902, withdrew from public entry, excepting under the homestead laws in accordance with the provisions of the Act, the lands required for the Government's first reclamation project, now known as the Newlands Project. Thereupon and with due diligence the United States proceeded with the construction of the Derby Dam across the Truckee River in the SW¼ of Section 19, in T. 20, N., R. 23, E., Mount Diablo Base and Meridian, and with the construction of the Truckee Canal, with a carrying capacity of 1,500 cubic feet of water per second, running from this dam a distance of 31 miles to the Lahontan Reservoir on the Carson River, and with the construction of the Lahontan Reservoir, with a storage capacity of 290,000 acre feet, and with the construction of about 250 miles of lateral and sub-lateral irrigation canals sufficient for carrying water for the irrigation of 151,000 acres. On April 30, 1919, the Government had expended for this project $6,252,000.00. The lands so withdrawn for reclamation are naturally dry and arid and without the application of water are of little or no value, but with irrigation will produce valuable crops and furnish homes and support for a large population.

Subject to prior appropriations and vested rights permitted and confirmed by the Act of Congress of July 26, 1866, the plaintiff is entitled and allowed to divert with a

priority of July 2, 1902, through the Truckee Canal 1,500 cubic feet of water per second flowing in the Truckee River for the irrigation of 232,800 acres of lands on the Newlands Project, for storage in the Lahontan Reservoir, for generating power, for supplying the inhabitants of cities and towns on the project and for domestic and other purposes, and under such control, disposal and regulation as the plaintiff may make or desire, provided that the amount of this water allowed or used for irrigation shall not exceed, after transportation loss and when applied to the land, 3.5 acre feet per acre for the bottom lands, nor 4.5 acre feet per acre for the bench lands under the Newlands Project.